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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

ORIGINAL DOCKET No. 8.

HENRY MORRISON

vs.

THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK and the HONORABLE ADDISON BROWN, the Judge of said Court.

MANDAMUS.

BRIEF OF PETITIONER.

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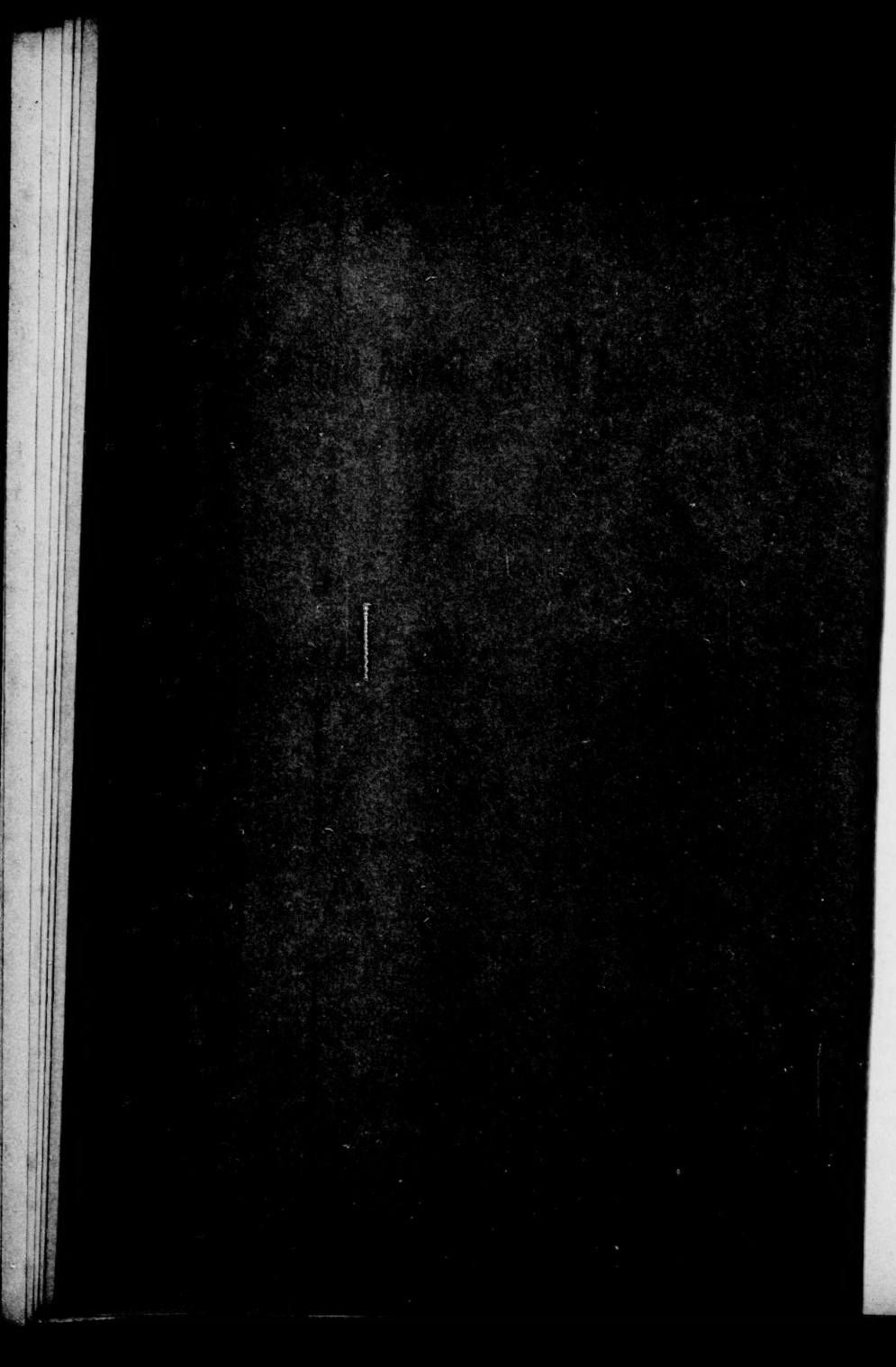

Supreme Court of the United States,

OCTOBER TERM, 1892.

ORIGINAL DOCKET No. 8.

HENRY MORRISON AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, and the Honorable ADDISON BROWN, Judge of the said Court.	Petition for Mandamus.

BRIEF FOR PETITIONER.

The return of the District Judge to the Rule submits the matter in question to the determination of this Court upon the papers annexed to the petition.

I.

Henry Morrison, the petitioner, on September 30th, 1892, filed his libel in the District Court of the United States for the Southern District of New York in a cause, civil and maritime, of apportionment of limited liability pursuant to Revised Statutes, Section 4284, against the

steamship "H. F. Dimock" and against the Metropolitan Steamship Company, owner thereof, and against William K. Vanderbilt, owner of the yacht "Alva," and all other persons claiming damages against said steamship company or its said steamship "H. F. Dimock," by reason of a collision which took place on July 24th, 1892, in Pollock Rip Slue at the entrance of Nantucket Sound, by which collision the "Alva" was sunk and completely wrecked and the property of divers persons on board of her was destroyed. Morrison was the master of the "Alva" and he alleges that his own personal property to the value of upwards of $1,300 was destroyed by the collision. He also alleges that the collision was caused by the fault of the "Dimock," but without the privity or knowledge of the Metropolitan Steamship Company, owner thereof; that by law, the liability of the steamship company, in respect of all losses caused by the collision, does not exceed the amount or value of its interest in said steamship and her then pending freight; that the aggregate losses of all the sufferers by the collision and the individual loss of said Vanderbilt, owner of the "Alva," exceed the value of the steamship company's interest in the "Dimock" and her freight; that, by law, Morrison and Vanderbilt and other sufferers are entitled to receive compensation from the owner of the "Dimock," in proportion to their respective losses only; and that the value of the "Dimock" at the time of the collision and the termination of the voyage she was then making, exceeded $200,000 and her then pending freight exceeded $2,300, and that the fund for apportionment among the several persons who suffered loss by the collision, exceeds $202,300.

Upon this libel, process in the usual form was issued to the Marshal of the Southern District of New York directing him to attach the "Dimock" and to cite said steamship company, and also said Vanderbilt and all other persons claiming to have suffered loss by the colli-

sion, to appear in said District Court on October 18th, 1892.

This process was returned by the Marshal on October 7th, 1892; he certifying that on September 30th, within his district, he had attached the "Dimock," and that on the 1st day of October he had personally served the said steamship company within his district by delivering to and leaving with its treasurer and agent a copy of the process and exhibiting to him the original, and that on the same day service of the process was admitted by the proctors for respondent Vanderbilt.

Vanderbilt appeared in said cause by his proctors on October 1st, 1892.

On October 7th said District Court, on motion of the steamship company, vacated said process, set aside the personal service thereof on the steamship company, released and set free the "Dimock" from the attachment and dismissed Morrison's libel as improperly filed.

The grounds for this action are set forth in an opinion which by a reference in the order is made a part thereof.

This opinion shows that the District Court, while considering that Morrison's cause was in every way properly constituted under R. S., Section 4284, was of the opinion that the libel was improperly filed by reason of certain proceedings for limitation of liability which had theretofore been commenced by the steamship company in the District Court of the United States for Massachusetts.

II.

The motion of the steamship company was brought on to be heard upon a copy of the proceedings in the Massachusetts District Court, sworn to be such by the treasurer of the steamship company, and upon certain affidavits submitted on behalf of the steamship company, and upon certain affidavits in opposition sub-

mitted on behalf of Morrison. Complete copies of all these papers are annexed to the petition here. Therefrom the following facts appear:

A. The Massachusetts petition was filed August 16th, 1892. Therein the steamship company denied all liability for the collision. It did not ask for the appointment of a trustee, or convey, or offer to convey, its interest in the steamship "Dimock" and pending freight to a trustee pursuant to Revised Statutes, Sec. 4285. It did not allege that said steamship was within the Massachusetts District, and it did not pray any process agaiust said steamship, nor in any way surrender the same to the custody of said District Court. It did not offer, in case the Court should adjudge it to be liable for the collision to any extent, to pay the value of its interest in vessel and freight into court for distribution. It did not allege that there was more than one person (namely, William K. Vanderbilt, the owner of the "Alva") who suffered loss by the collision.

It did set forth *inter alia* that the "Alva" was worth over $250,000, and that the value of the "Dimock" and pending freight was "*less than $150,000.*"

B. On the same day, August 16th, a warrant was issued out of the Massachusett's Court directing the Marshal of that District to cause the "Dimock" to be appraised by three persons named therein; which warrant was returned by the Marshal August 17th, he certifying that he had notified the appraisers of their appointment and had requested them to attend to the duties assigned them and that they had attended and that they had reported that they had appraised the steamship at $80,000, and her freight, pending at the time of the collision, at $2,395.33.

C. That on the same day (August 17th) the Massachusetts Court made an order for a stipulation to be given by the Steamship Company in the appraised amount, which stipulation was given that same day.

D. That on that same day (August 17th) a monition was issued to the Marshal of the Massachusetts District directing him (1) to give notice of the filing of the Steamship Company's petition to Vanderbilt and to all persons concerned; (2) to cite Vanderbilt and all persons claiming damages arising out of the collision to appear on November 25th, and make due proof of their claims; (3) to give notice by serving an attested copy of the monition on Vanderbilt if found within the Massachusetts District; and (4) to give further notice by advertising in the "Boston Daily Advertiser," and by posting a copy of the notice at the Court House in Boston.

E. That on that same day (August 17th) an injunction decree was entered enjoining Vanderbilt and all persons claiming damages from prosecution of all and every suit or suits against the steamship company as owner of the steamship "Dimock," or against said steamship in respect of any claim arising out of the collision except in those proceedings. *This decree is not a mere temporary restraining order, to last only till a hearing can be had; it is an absolute injunction.* It recites nothing except the filing of the steamship company's petition, the said appraisement, the giving of said stipulation, the issuance of said monition and the fact that the steamship company had applied therefor. It contains no provision for a hearing of damage claimants upon the matter thereof, and it does not purport to have been made on notice, and an opportunity to be heard, given to anybody interested adversely to the steamship company.

F. That on August 27th an amendment to the libel was allowed and filed, wherein the steamship company alleged "that at the time the libel and petition was filed in this cause, the said steamship 'H. F. Dimock' was, and has ever since been, lying in the port of Boston and within the admiralty jurisdiction and process of this Honorable Court."

G. That the "Dimock" was never attached by any process issued out of the Massachusetts Court and that that Court never took said steamship into its custody or assumed control thereof.

H. That after said amendment to the steamship company's libel, and before the filing of Morrison's libel in the Southern District of New York, the steamship "Dimock" departed from the District of Massachusetts and was no longer in said district or subject to the control of the Court of said district or within the reach of the process of said Court (such departure being without any obligation to return said steamship into said district and without any leave of said Court obtained or sought).

I. That the only thing left within the District of Massachusetts to be divided among damage claimants (if any should appear at the time mentioned in the monition), and subject to be disposed of by the decree of the Massachusetts Court in the proceeding there pending is the said stipulation for $82,395.33.

J. That no notice of said appraisement proceedings or said stipulation proceedings or of said injunction proceedings was required by the Massachusetts Court to be given to any damage claimant, and neither Morrison nor any other damage claimant had in fact any notice thereof or any opportunity to be heard thereon.

K. That neither Morrison nor Vanderbilt nor any

other damage claimant has been personally served with process in the Massachusetts District.

L. That neither Morrison nor Vanderbilt nor any other damage claimant has entered any appearance in the Massachusetts court.

M. That Vanderbilt has received (but not within the District of Massachusetts, and not till after August 17th) a copy of said monition and a copy of said injunction decree.

N. That Morrison has not been served with any paper in the Massachusetts proceeding, either within or without the Massachusetts district.

III.

The combined effect of the two proceedings, if sustained, is:

That Morrison and Vanderbilt have been deprived of their remedy against the "Dimock" and its owners, and are confined to a proceeding to obtain a share of a stipulation for $82,395.33' although the owners of the "Dimock" value it at $150,000, and Morrison and Vanderbilt value it at $200,000; and

That no Court has any power to give relief beyond a share in that stipulation, because the "Dimock" has departed from the jurisdiction of the District Court of Massachusetts and its owners have never submitted themselves to the jurisdiction of that Court by any offer to pay any sum in excess of the stipulation.

And this has been accomplished by a wholly *ex parte* proceeding, begun and finished between the morning of one day and the evening of the next day, without notice, actual or constructive, to any one whomsoever, and without any opportunity or pretense of opportunity for a hearing on the part of Morrison, Vanderbilt or any other person adversely interested.

IV.

The ultimate questions, presented by the petition for the decision of this Court, are:

FIRST. Whether mandamus is the proper remedy to correct the action of the District Court for the Southern District of New York if such action was erroneous.

SECOND. Whether the steamship company's proceedings in Massachusetts have the *legal effect* assigned to them by the New York Court.

V.

See appendix for full text of the statutes and rules involved in the discussion of the second question.

FIRST POINT.

Mandamus is the Proper Remedy.

The District Court for the Southern District of New York dismissed Morrison's libel "as improperly filed," and it thus put not only the cause, but the libellant himself out of Court.

It also set aside the personal service of the process on the steamship company, and released that company's vessel from attachment and vacated the process, so putting the respondent and the property proceeded against out of Court.

In effect, the District Court did not decide Morrison's cause but refused to entertain it; and the petition here,

therefore, falls directly under the numerous mandamus precedents made by this Court.

See *ex parte* Russell, 13 Wall., 669–70; and *ex parte* U. S., 16 Wall., 699, as to the circumstances when appeal and mandamus respectively are the proper remedies.
See also *ex parte* Bradstreet, 7 Peters, 647.
Ex parte Roberts, 15 Wall., 384.
Ex parte Schollenberger, 96 U. S., 369.
Ex parte Parker, 120 U. S., 737.
In re Pennsylyania Co., 137 U. S., 451.
(And other cases therein cited).

SECOND POINT.

The appraisement, stipulation, and injunction proceedings in the Massachusetts Court, having been taken without any notice or opportunity to be heard being given to damage sufferers, are wholly without effect upon their rights. They do not destroy Morrison's capacity to sue or discharge the steamship company or its vessel from liability to be sued.

We limit the proposition to the proceedings named, because, if those proceedings are ineffective, we do not suppose that it will be claimed that there is anything else which could affect Morrison's capacity to sue, or the liability of the steamship company and its vessel to be sued.

I.

The discussion of this subject proceeds upon the following assumptions:

A. That, if Morrison's allegations are true, he ac-

quired by the collision a right to recover damages to some extent against the steamship company personally in any District Court which could obtain personal jurisdiction of that company.

And he also acquired a right to recover damages to some extent against the steamship "Dimock" in any District Court which could obtain jurisdiction *in rem* of that vessel.

B. That his right against the "Dimock" is not a right of action merely, but *jus in re*, a property interest in the ship of which he cannot be deprived without due process of law.

C. That the Limited Liability Act does not take away or affect any of the foregoing rights *ex proprio vigore*, as an exercise of the legislative power of the United States, but leaves them to be limited and qualified judicially by the Courts in accordance with the principles which it lays down.

D. That after the collision and before the steamship company filed its libel in Massachusetts, Morrison, by virtue of the Limited Liability Act itself, had a right to prosecute an apportionment suit in any District Court which could obtain jurisdiction *in rem* of the steamship "Dimock," and *in personam* of its owner, and all known damage claimants; and the further right to have any such Court adjudicate upon the questions (1) whether the steamship company and its steamship were liable to any extent, *i.e.*, whether the collision was caused by fault on the part of the "Dimock; (2) if so, how much the value of the company's interest in the "Dimock" and freight for the voyage was; (3) whether the aggregate losses of all damage sufferers exceed that amount; and (4) if they do, how, or in what proportions, that amount ought to be divided among the sufferers.

E. That the only conceivable or possible ways in

which the Massachusetts proceedings can have affected the last mentioned right are as follows:

FIRST. By destroying Morrison's personal capacity to sue;

SECOND. By discharging and releasing the Steamship Company and its vessel, the "Dimock," from liability to be sued;

THIRD. By conferring upon the Massachusetts Court exclusive jurisdiction to determine the above questions, being the questions presented alike by the Steamship Companys' libel and by Morrison's libel.

II.

"Due process of law" guaranteed to every person by Article V of the Amendments to the Constitution, implies, with reference to proceedings under the judicial power of the United States (however it may be under other sovereign powers, such as the tax power, the power of eminent domain, &c.), notice of some kind and opportunity to be heard not only as a requisite but as a *pre*-requisite.

Cooley's Constitutional Limitations (5 Ed. p. 436).
2 Hare C. L., p. 858.

III.

By Constitution, Art. III., Sec. 2, the judicial power of the United States, and, necessarily, of all courts constituted by the authority of the United States, is limited to "cases."

> "The third article (of the Constitution) declares that the judicial power shall extend to all cases, &c. * * * This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution laws and treaties of the United

States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case," &c.

Osborn vs. U. S. Bank, 9 Wheaton, 738, 819.
U. S. vs. Lee, 106 U. S., at 219.
Smith vs. Adams, 130 U. S., 173.
In *re* Pacific Ry. Commission, 32 Fed. Rep., at 255.

"A case consists of the right of one party as well as the other."

Cohens vs. Virginia, 6 Wh., 264, 379.
Tennessee vs. Davis, 100 U. S., 264.

The rights of damage claimants have never been submitted or subjected in any form to the Massachusetts Court. Consequently the appraisement, stipulation and injunction proceedings in that Court cannot be regarded as constituting a case under the constitution, and cannot be effective by virtue of the judicial power of the United States.

IV.

This Court has frequently decided that proceedings in Court of which the persons whose rights purport to be affected thereby have no notice of any kind, actual or constructive, and in which they have no opportunity to be heard, are ineffective. They are not judicial proceedings.

Windsor vs. McVeigh, 93 U. S., 274.
Alexandria vs. Fairfax, 95 U. S., 774.
Smith vs. Woolfolk, 115 U. S., 148, 149.
Sabariego vs. Maverick, 124 U. S., 261, 292 *et seq.*
Hassall vs. Wilcox, 130 U. S., 493.

Bradstreet vs. Neptune Ins. Co., 3 Sumner, 600.
The J. W. French, 13 Fed. Rep., 916.

V.

It cannot be said that an opportunity to be heard would necessarily and as matter of law have been of no advantage to damage claimants.

A. They might have convinced the Court that the appraisement ought to be made by the Court itself, or by a Commissioner, on sworn testimony with an opportunity to both sides to produce and cross-examine witnesses.

B. If the Court decided to refer the question to experts, they might have convinced the Court that the particular experts selected were not competent or were not impartial by reason, *e. g.*, of owning stock in the steamship company or in some insurance company responsible over to the steamship company.

C. They might have satisfied the Court that the appraisers' report ought to be rejected because it does not show the principles on which the appraisers proceeded or as of what time the value of the steamship was taken, or because the appraisers did not personally examine the steamship, &c., &c.

D. They might have convinced the Court that in form the stipulation should be broad enough to cover not merely what the appraisers estimated the value of the Steamship Company's interest in the ship and freight to be, but also what damage claimants asserted the value of such interest to be, so that if on final hearing the issue tendered in the Steamship Company's libel as to the value of ship and freight should be determined against the Company and in favor of damage claimants, the Court would have some means of compelling

the Company to pay the adjudicated value into Court for distribution.

E. They might have convinced the Court that the sureties on the stipulation were insufficient.

F. They might have convinced the Court in its discretion (1) that for one or other of the preceding reasons, or for similar reasons, no injunction ought to issue; or (2) that the injunction ought to be on condition that the steamship company binds itself with sureties to pay into court the value of ship and freight as finally adjudicated; or (3) that the rights of the parties could be more conveniently and justly determined by allowing damage claimants to assert their claims in their own way and allowing the steamship company to set up the apportionment proceedings as a plea in bar or in abatement; or (4) that no injunction ought to issue until the value of ship and freight had been adjudicated after trial and paid into court by the steamship company or secured to be paid.

VI.

Nor can it be said that the Massachusetts proceedings are necessarily, as matter of law, equivalent to a transfer of vessel and freight by the steamship company to a trustee under Revised Statutes, Section 4285.

They manifestly may be very far from being an equivalent in fact.

There is nothing in the Limited Liability Act which authorizes, legislatively, a ship owner at his option, either to transfer his interest in ship and freight to a trustee or to pay into court the value of ship and freight as determined by an *ex parte* appraisement. There is nothing in the act which declares that it shall be a sufficient compliance with the act on the part of a ship owner if he pays, or secures to be paid, into court the value so appraised, or which provides that

from and after such payment all suits and proceedings against the ship owner shall cease.

The act leaves the creation of a substitute, in lieu of a transfer to a trustee, to the Courts *proceeding judicially.*

VII.

It follows necessarily:

A. That the rights of damage claimants arising out of the collision against the steamship company personally, and in and against the steamship, remain precisely as they were before the steamship company filed its libel.

B. That those rights have never been transferred from the steamship company and its steamship to the fund represented by the stipulation.

C. That that fund cannot be regarded as being *the* fund to be apportioned among damage claimants, it never having been adjudicated or judicially established to be such.

D. That, if Morrison's right to proceed against the steamship and the steamship company in the New York Court has been taken away or suspended by the Massachusetts proceeding, it must be for some other reason (1) than that the Massachusetts Court has adjudicated that damage claimants ought to be enjoined from proceeding in any other Court; or (2) than that damage claimants have been incapacitated or rendered personally incompetent to sue; or (3) than that the steamship company and its steamship have been released and discharged from liability to be sued.

The only other conceivable or possible way in which Morrison's right to proceed in the New York Court can have been affected, is that the jurisdiction of the Massachusetts Court, of the subject matter, at first pos-

sessed by it only concurrently with all other District Courts, has somehow become exclusive ; so that Morrison can proceed against the steamship and the steamship company in that forum only.

THIRD POINT.

The District Court of the United States for the District of Massachusetts has not acquired any exclusive jurisdiction of the subject matter.

I.

The subject matter involves the determination of the following questions :

A. Whether the " Dimock " was in fault for the collision ?
B. If she was, what her value and the value of her pending freight at the termination of the voyage was ?
C. Whether the aggregate losses of all damage sufferers exceed that amount ?
D. If they do, in what proportions that amount is to be apportioned among the damage sufferers ?

II.

As the record stands, the Massachusetts Court is not competent to adjudicate the first question presented by both libels, namely, the question whether or not the collision was caused by fault on the part of the " Dimock." A fortiori, it has not acquired any exclusive cognizance of that question.

A. In order to determine the question, the Massachusetts Court needs to have either personal jurisdiction of one or more damage claimants or jurisdiction *in rem* of the very *res* (namely, the steamship "Dimock") which is claimed to be guilty.

Plainly, in a cause brought directly by a damage claimant no District Court could make a valid decree as to the "Dimock's" being or not being in fault without first getting personal jurisdiction of the Steamship Company or its officers or agents, or without first getting jurisdiction *in rem* of the steamship, unless the damage claimant was willing and consented to have the question litigated upon an attachment of other property of the Steamship Company made in order to force a personal appearance.

The converse of this must be true.

Compare Exp. Phenix Ins. Co., 118 U. S., 610.

B. Control of the fund represented by the stipulation does not authorize a determination of this question.

That fund was not present at the collision. It did not sink the "Alva," nor destroy Morrison's instruments of navigation. Nobody claims that the fund is guilty. And nobody claims any interest in the fund or right against the fund by reason of the collision. The fund has not been judicially substituted for the "Dimock," and the "Dimock" has not been discharged from liability for the collision.

Clearly, so long as the liability of the ship continues, it is the only *res*, possession and control of which will authorize any Court to pronounce a judgment *in rem* upon the question above stated. So long as the vessel's liability continues, possession of this fund is of no more consequence than a deposit in court of a silver dollar or a surrender

to the Marshal of one of the company's other ships would be.

C. The Massachusetts Court never has acquired jurisdiction of the "Dimock."

(1) For that, actual assumption of possession and control by the Court's officers is essential.

Henry, Admiralty, Sec. 132, and cases cited.
The Rio Grande, 23 Wall., 458.

(2) There never has been any such assumption by seizure or otherwise.

(3) If the fact stated in the amendment (filed Aug. 27) to the steamship company's libel, that when the libel was filed the "Dimock" was, and ever since has been, within the District of Massachusetts, and within the reach of the Court's process, can be regarded as giving the Court jurisdiction thereof, such jurisdiction was lost and all rights of the steamship company arising therefrom abandoned by its taking the "Dimock," before the return day of the monition, out of the Massachusetts District to the port of New York without leave of Court and without procuring any release or discharge, and without entering into any obligation to bring her back.

Waples, *Proceedings In Rem.*, Secs. 37, 54.

D. The Massachusetts Court never has acquired personal jurisdiction of Morrison or any other damage claimant.

(1) For that (there being no voluntary appearance), service of process within the Massachusetts District is as essential in admiralty cases as at law or in equity.

Toland vs. Sprague, 12 Peters, 327.
Picquet vs. Swan, 5 Mason, 50.
Manro vs. Almeida, 10 Wheaton, 473.

Ex parte Graham, 3 Wash., 456; S. C., 4 *id.*, 211.
Atkins vs. Disintegrating Co., 18 Wall., 306.
Paine vs. Caldwell, 6 Nat. Bk. Reg., 558.
Re Hodges, 11 *id.*, 369.

This legal principle does not depend at all for its validity upon the negative provision in various statutes that persons shall not be sued in a civil suit except in the district where they reside or are found. It grows out of the nature of the organization of the District Courts. Congress, by confining those Courts to particular districts and by providing in a few cases (such as executions on judgments in favor of the United States and subpœnas to witnesses within one hundred miles of the place of trial) that their process may be executed out of the district, has manifested its will that ordinarily process shall not be executed out of the district. "We think [says this Court in *Toland vs. Sprague*, p. 329] that the opinion of the Legislature is thus manifested to be that the process of a Circuit Court cannot be served without the district in which it is established without the special authority of law therefor."

(2) Neither Morrison nor Vanderbilt, the only known damage claimants, has been within the District of Massachusetts since the steamship company's libel was filed, and both testify that no process has ever been served upon them there. The record of the Massachusetts Court does not purport to show service there on anybody.

III.

The Massachusetts Court has not yet acquired jurisdiction (much less exclusive jurisdiction) to determine any of the other questions presented by the two libels.

A. This point is a necessary corollary of the preceding point.

Power to determine the extent and limit of liability and how it shall be apportioned must be, necessarily, and in the nature of the case, dependent and conditional upon power to determine whether there is any liability or not, unless the fact of liability to some extent is admitted. There can be no limitation and no apportionment of what does not exist.

B. The Massachusetts Court has not acquired personal jurisdiction of any damage claimant, nor jurisdiction *in rem* of any property in which damage claimants have or claim any interest or against which they have or claim to have any right of action. As the case stands, it could not make a valid decree. How, then, can its jurisdiction of subject matter be exclusive ?

C. The Steamship Company has not submitted itself to the jurisdiction of the Massachusetts Court sufficiently to enable that Court to render an effective decree as to it.

(1) What the steamship company should have done was to make in its libel an unqualified and unconditional offer, substantially in the terms of the statute, to pay into court, for partition among damage sufferers, whatever the Court should determine that the value of its interest in vessel and freight was.

For want of such an offer, it was held in the first apportionment case that came before this Court that the District Court of Connecticut (in which Court an *in personam* case against a shipowner was pending, and in which the shipowner had presented a petition asserting that there were other damage claimants and that the aggregate of the losses suffered by all claimants exceeded the

value of ship and freight, and praying that the libellant in the *in personam* suit might be limited in his recovery to his proportional share of ship and freight) had no jurisdiction.

Norwich Co. vs. Wright, 13 Wall., 104.

(2) Instead of doing this, the steamship company has made no express offer or submission of any kind.

(3) The only offer that can be implied (and for this recourse must be had to the prayers of the libel), is to pay or secure to be paid the amount at which the Court may cause the value of steamship and freight *to be duly appraised.*

This offer is insufficient, because it does not mean and was not understood either by the steamship company or by the District Court to mean, the amount which the Court should adjudicate, after hearing the arguments and proofs of parties adversely interested, to be the value of ship and freight. The phraseology must be construed in the light of the course and practice of the Massachusetts Court, illustrated in this record and certified to by the District Judge in his return in the prohibition case, to mean an amount to be arrived at by an *ex parte* appraisement.

So construed, the offer has already been complied with to the expressed satisfaction of the Massachusetts Court (see the recitals in the subsequent proceedings), and no power is left in that Court to compel the steamship company to pay anything more than the appraised amount, even if, on the proofs, it should find that the value of the "Dimock" and pending freight was double or treble that amount.

Moreover, the steamship itself has been taken out of the District, so that absolutely nothing is left within the reach or control of the Massachu-

setts Court except a stipulation for an amount which, as Morrison and Vanderbilt allege and offer to prove, is less than one-half the true amount.

If Morrison aud Vanderbilt should appear in the Massachusetts Court and establish, by the clearest proof, that the liability of the steamship company is not less than $200,000, what could the Massachusetts Court do against the will of the steamship company?

FOURTH POINT.

There is nothing in the Limited Liability Act or in the Admiralty Rules made by this Court or in the Decisions of this Court in Apportionment Cases, which is repugnant to the foregoing conclusions.

I.

As to the Limited Liability Act.

There is nothing in the act which authorizes a District Court to send its process out of the District for the purpose of acquiring personal jurisdiction; nothing which authorizes it to proceed according to the mode of procedure prescribed for *in rem* cases, to adjudicate the question whether a ship was in fault without first acquiring possession and control of the ship itself; nothing which authorizes it to proceed at the suit of a ship owner in an apportionment case unless the ship owner first submits himself unqualifiedly to the jurisdiction of the Court to the full extent of the value of his ship and freight as it may finally be determined after hearing of parties adversely

interested; nothing which authorizes it to proceed *ex parte* and ministerially to establish the fund for apportionment; nothing which authorizes it to transfer the right of damage claimants from being a right against the shipowner personally and in and against his ship to a right against a fund, without first giving damage claimants an opportunity to be heard; nothing which authorizes it to issue an absolute injunction without a hearing, or which makes such an injunction binding on persons out of the District of whom personal jurisdiction has not been obtained.

The act, while it shows plainly enough a result which Congress desired to accomplish, does not provide any new means or machinery for accomplishing the result except through a transfer to a trustee; and it leaves shipowners to ordinary judicial proceedings with all the existing limitations upon such proceedings, if they would accomplish the intended result otherwise than through a transfer to a trustee.

II.

As to the Admiralty Rules:

A. The rules should be construed in the light of the limitations upon the Court's power to make rules.

The power extends no further than to the "mode of proof in causes of equity and of admiralty and maritime jurisdiction" (R. S., Sec. 862); to "forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction" (R. S., Sec. 913); and "to prescribe * * * the forms of writs, &c., * * * the modes of framing and filing proceedings and pleadings, &c., * * * of proceeding to obtain relief, &c., * * * and generally to regulate the whole practice to be used, in

suits in equity or admiralty by the Circuit and District Courts" (R. S., Sec. 917).

The power of the Supreme Court, while paramount, is no more extensive in scope than the power of the Circuit and District Courts (Secs. 913, 918).

And it is expressly limited so that no valid rule can be "*inconsistent with any law of the United States*" (Secs. 917, 913, 862).

In The Benefactor, 103 U. S., at page 243, it is said: "The fifty-sixth rule is merely intended to relieve shipowners from the English rule of practice which requires them, when they seek the benefit of the law of limited liability, to confess the ship to have been in fault in the collision. This was deemed to have been a very onerous requirement. * * * Hence, this Court, in preparing the rules of procedure for a limitation of of liability, deemed it proper to allow a party seeking such limitation to contest any liability whatever. But this rule of procedure was not intended to abrogate, and indeed *could not* abrogate the rule of law that *res judicata* * * * cannot be again opened. * * * Of course, therefore, the rule of procedure allowing a contestation of all liability is *subordinate* to this rule of law and *cannot apply* where the question of general liability has already been adjudicated."

Whatever is true of the rule of *res adjudicata* must be equally true, for the same reasons, of any and every other rule of substantive law.

B. Plainly, therefore, there cannot be anything in the rules which abrogates or limits the operation of any substantive law of the United States, whether prescribed by the Constitution or by Statute or otherwise existing.

1. Plainly, the Supreme Court cannot authorize a District Court to deprive any man of any right,

except upon notice of some kind and an opportunity to be heard.

2. Plainly, also, the Supreme Court cannot *enact legislatively* that an *ex parte* proceeding in a District Court shall have the effect of discharging a person or vessel from liability, or of transferring the liability to a fund or bond.

3. Plainly, also, the Supreme Court cannot authorize a District Court, without notice or hearing, to issue an absolute injunction forbidding persons to assert their rights when and where they please.

4. Plainly, also, the Supreme Court cannot authorize a District Court to send its process beyond the territorial limits prescribed by statute, or (in the absence of voluntary appearance) to proceed in a cause which is essentially an *in personam* case, except upon first acquiring personal jurisdiction by service of process within the territorial limits of the Court's process, or to proceed in a case which is essentially a suit *in rem*, except upon first acquiring jurisdiction of the very *res* in which the persons, whose rights are to be affected, have, or claim, an interest.

C. The difference in the mode of procedure in *in personam* cases and in *in rem* cases *in respect of the manner of acquiring power to affect personal rights* is not mere form and practice, but (like the difference between law and equity) is matter of substantive law beyond the lawful authority of this Court to eradicate by rule. In an *in personam* case (or in any case in so far as it is a case *in personam*) there must be service of process within the territorial limits of the Court's process, and no sort of notice outside those limits will suffice to authorize the Court to proceed to judgment in the absence of voluntary appearance. In an *in rem* case the *res* must be seized, or control thereof in some way as-

sumed by the Court, and, after seizure, any sort of notice within or without the jurisdiction will make the Court competent to proceed to judgment.

Freeman vs. Alderson, 119 U. S., 185.
Pennoyer vs. Neff, 95 U. S., 714.
Insurance Co. vs. Bangs, 103 U. S., 435.
Windsor vs. McVeigh, 93 U. S., 274.
Waples' Proceedings *in Rem*, Sec. 32.

Thus, if (as the Metropolitan Steamship Company has done in this case), a shipowner does not libel his ship nor the proceeds of his ship already in court, nor a stipulation for value already substituted for his ship in a judicial proceeding, but at the outset goes merely against one or more damage claimants, his suit will be essentially one *in personam* and it will continue so till the question of fault on the part of his ship and the question of the value of his ship and pending freight are adjudicated and the ascertained amount paid into court; it will then (and then, for the first time) become a suit essentially *in rem* for the partition of the fund.

D. What is the true meaning of those portions of the rules upon which the New York Court relied in dismissing Morrison's libel as improperly filed?

Judge BROWN assumes that the purpose of Rule 54 is to provide for the giving of a stipulation as a *substitute* for the vessel so as to lay a foundation for a proceeding *in rem*.

If that is so, the provision for "*due* appraisement" in the rule, *must* imply notice and an opportunity to be heard given to damage claimants, or at least to some representative of their class; otherwise the rule would be inconsistent with the laws of the United States, and, therefore, invalid.

A different purpose for Rule 54 is shadowed forth in one of the opinions of this Court. In *Ex parte Slayton*, 105 U. S., at pages 452-3, it is said: "No monition

can properly issue either under the operation of our rules or otherwise until this jurisdiction of the thing has been in some way secured. * * * All these are questions to be settled in some other way than by prohibiting the Court from proceeding under the jurisdiction it has acquired by getting possession in an appropriate manner of that which *according to the claim of the owner* represents the extent of his liability or that of his vessel. *Whether it does so or not is to be settled between the parties when the case is tried.* With the possession and control of the property the Court has jurisdiction."

This seems to mean that the purpose of Rule 54 is not to transfer liability from person and ship to fund or bond or to create a substitute for the vessel, but to give the Court control of a fund which, *according to the claim of the shipowner*, represents the extent of his liability.

If this is so, then *due* appraisement would not necessarily imply notice to damage claimants. But on this view no proceedings *in rem* could be based upon the Court's possession of the fund. *The fund would not be property in which, specifically or otherwise, damage claimants have or claim an interest.* Upon the trial it might be found that the fund did not correctly represent the extent of the shipowner's liability. Jurisdiction *in rem* cannot be conditional upon the finding of facts at the trial. *It must exist before there can be any lawful trial.* It must exist, if at all, at the beginning of the proceedings. Possession of a fund *merely claimed by the shipowner* to represent the extent of his liability would authorize *in personam* proceedings only and an effective judgment could be made only if personal jurisdiction of damage claimants was in some lawful way first obtained. The case on this view is exactly the same as it would be if in his libel the shipowner should assert the extent of his liability and pay the

amount into Court. That would give the Court jurisdiction (provided the ship owner also offerred to pay any further amount which the Court might adjudicate to be necessary in order to give the Court possession of the whole fund as ascertained after hearing parties adversely interested), but jurisdiction to proceed *in personam* only. The Court could not proceed *in rem* upon that fund till it had first adjudicated that the shipowner's claim was true and had released him and his ship from liability and transferred the liability to the fund.

Judge BROWN also relies on the provision in Rule 54 that a restraining order shall be issued on the application of the shipowner, considering that this provision is made on the analogy of the statutory provision in case of a transfer to a trustee.

This provision of the rule certainly cannot mean that an absolute injunction shall be issued without a hearing or that any injunction whether absolute or *nisi* shall be sent out of the district for service on persons of whom the Court has not obtained personal jurisdiction. That would be to make the rule inconsistent with the laws of the United States and therefore invalid.

Even in the analogous case of a transfer to a trustee no absolute injunction could issue without a hearing. The statute does not say that any injunction shall issue. It says: "From and after which transfer all claims and proceeding against the owner shall cease"; *it does not say that they shall be made to cease by an absolute injunction issued without a hearing.* Clearly, inasmuch as proceedings are to cease only after a transfer, the fact of transfer must always be traversable, and damage claimants would be entitled to be heard thereon. Suppose, for example, a shipowner executes a paper which purports to convey his interest in ship and freight to a trustee, but just before doing so he has transferred a part of his interest to a friend; would he then be entitled to have proceedings

cease? Or suppose, instead of transferring the whole of the freight, he transfers only part of it? Moreover, an issue could always be made on the question whether the collision happened with the privity or knowledge of the ship owner. And, again, suppose the ship owner waits till, by use profitable to him, and by wear and tear, his ship has depreciated largely in value, so that it is no longer worth, say, even half so much as it was worth at the termination of the voyage; would not his laches debar him from claiming the benefit of a transfer to a trustee and leave him personally liable to the extent of the difference between the value at the time of transfer and the value at the termination of the voyage?

Clearly, the meaning of the rule must be that, on the application of the ship owner, a restraining order, to last only till the hearing and decision of a motion for an injunction, may be issued. Such an order would bind any damage claimant of whom the Court obtained personal jurisdiction, and it would bind no one else.

III.

As to the Decisions of this Court in Apportionment Cases.

A. In *Norwich Co. vs. Wright*, 13 Wall, 104, the points decided were (1) that the District Courts as Courts of Admiralty have jurisdiction of the subject of limitation and apportionment of liability; (2) that on a particular petition by a ship owner, not containing any offer on his part to pay the value of vessel and freight into Court, the District Court of Connecticut had no jurisdiction; and (3) that the District Court for the Eastern District of New York (where it was alleged an *in rem* case airsing out of the same tort was pending) would be

a proper court for the shipowner to institute his proceedings in; and (4) that the shipowner ought to have a further opportunity to institute his proceedings.

In the *Benefactor*, 103 U. S., 239, the points decided were: (1) That it was not too late for a shipowner to institute apportionment proceedings after a decree against him in an ordinary cause of collision *in rem*; and, (2) that such proceedings may be taken in the Circuit Court after appeal from the District Court; and, (3) that the decree in the collision case was *res adjudicata* on the questions of fault on the part of the ship and on the amount of libellant's loss.

In *ex parte Slayton*, 105 U. S., 451, the points decided were (1) that a ship owner is entitled to institute apportionment proceedings in advance of any suit *in rem* or *in personam* being brought against him, although the rules then existing did not contemplate such a case; and (2) that a District Court to which he had presented a petition offering to transfer his interest in vessel and freight, and which had appointed a trustee to whom he had delivered the amount of freight admitted to be pending, had such jurisdiction of the cause that it could not be prohibited by this Court from proceeding further. It was not decided and as the case stood before this Court could not be decided whether the District Court (without its trustee's first acquiring possession of the ship) was authorized to proceed according to the mode of procedure prescribed for *in rem* cases or whether it was limited to proceeding *in personam*.

In *The Mamie*, 110 U. S., 742, it was decided that pending an appeal here, this Court would not, even if it had the power to do so, issue an injunction to stay proceedings in State courts when the District and Circuit Courts had dismissed an apportionment suit on

the ground that the vessel was not one of the class of vessels to which the act applies.

In *The City of Norwich*, 118 U. S., 468, the following points (with others not material here) were decided: (1) That the jurisdiction of a District Court to entertain a cause of limitation and apportionment of liability is not dependent upon its having prior possession of the alleged guilty ship or of its proceeds, or of a stipulation for its value; (2) that the fact that in an ordinary *in rem* case in the same Court a stipulation for value had been given did not constitute the fund represented thereby *the* fund to be apportioned, and did not prevent the Court from proceeding in the apportionment suit to ascertain, entirely without regard to what had been done in the other case, the amount to be apportioned; (3) that the time as of which the value of vessel and freight is to be taken is the termination of the voyage; and (4) that the payment into court under judicial sanction of the value of ship and freight "has the effect of discharging the owner's liability, and thereby of extinguishing the liens on the vessel itself, and transferring those liens to the fund in court." This Court did not decide that the payment into court of what the shipowner *claims to be* the value of ship and freight or what is found *to be the value on a wholly ex parte appraisement* has that effect. No such question was before the Court or could have been decided; for (as the transcript of record shows) the appellants here were parties who had appeared in the District Court, and had had notice of the appraisement and an opportunity to appear and be heard and to put in evidence and cross-examine witnesses before the Commissioner appointed to make the appraisement, and they did appear before him and were heard, and they excepted to the Commissioners' report, and were heard on their exceptions.

In *Ex parte Phenix Ins. Co.*, 118 U. S., 610, it was

decided that the District Court had no jurisdiction of a suit for limitation and apportionment of liability in which the petitioner contested all liability and alleged that the losses were due to the destruction of buildings and other property on land by a fire claimed to have been negligently started on his ship; the reason being that the alleged torts were not maritime in character so as to be cognizable in the District Court in suits brought directly by the sufferers of damage.

In *Butler vs. Boston & Savannah S. S. Co.*, 130 U. S., 527, there were two appeals by the same party from the same Court—one in a suit for limitation and apportionment, in which the appellant appeared, and in which it was admitted on the record (see the Transcript) that due appraisement was made and a stipulation duly given, and the other in an ordinary *in personam* case brought by the appellant against the shipowner for damages. In the limitation suit the Courts below granted the relief prayed for, and in the other case they held that the record of proceedings in the limitation suit was a bar. The decrees in both cases were affirmed by this Court. The points decided were (1) that the act applies to personal injuries; (2) that on the facts (the wrecking of a steamship off Gay Head) the losses were maritime in character; and (3) that there was no ground for holding that the losses were with the privity or knowledge of the steamship owner.

In *In re Garnett*, 141 U. S., 1, the points decided were (1) that the "Katie," a ship engaged in navigating the Savannah River between Augusta and Savannah, is a vessel to which the Limited Liability Act, as amended by Section 4 of the Act of June 19, 1886, applies; and (2) that the amendatory act is constitutional.

B. The only case which presents any difficulty is Prov. & N. Y. S. S. Co. vs. Hill Mfg. Co., 109 U. S., 578.

That case was a writ of error to the Supreme Judicial Court of Massachusetts bringing up its judgments (in a suit for damages arising out of the loss of a ship's cargo by fire) upon the effect of a decree of the District Court for the Southern District of New York in a limitation suit whereby the shipowner was exonerated from all liability and the further prosecution of all suits enjoined. The Massachusetts Court held that the Limited Liabilty Act did not apply to fire damage and gave judgment for the plaintiff; holding also that under the federal statute which is now R. S., Sec. 720 the Federal Courts were forbidden to enjoin proceedings in a State Court. This Court reversed the judgment; a majority of the Judges holding that the act does apply to fire damage, and that the decree in the limitation suit was an absolute bar.

This Court did not decide the question whether the Federal Courts in an apportionment case can enjoin proceedings in a State Court, but held that, whether they could or not, the decree exonerating the ship owner was an adjudication barring the State suit.

The case differs from ours in the following particulars: (1) There was a full offer and submission by the petitioner (109 U. S., p. 581, middle); (2) Several damage claimants representing the class to which the Massachusetts plaintiff belonged were served, within the Southern District of New York, with notice of the appraisement and given an opportunity to appear before the Commissioner and be heard before the appraisement was made, and they did appear and were heard (see transcript of record); and (3) the Massachusetts plaintiff made no point either in the Massachusetts Court or in this Court on not having personally been notified of the appraisement proceedings or on not having been served with process within the Southern District of New York. On the contrary, the opinion shows that according to the understanding of

this Court the plaintiff admitted that it had been duly served. In the recital of facts upon which the opinion is based it is stated (109 U. S., page 584, bottom, and page 585, top), that at the trial the defendants "put in evidence the record of proceedings upon their libel and petition in the District Court of the United States for the Southern District of New York corresponding to the statements of their answer, *and it was admitted that process and the restraining order issued in said suit had been duly served upon the plaintiffs.*"

The facts of the case were not of a kind to develop any earnest and strenuous controversy as to the method of applying the Limited Liability Act. The ship was burned to the water's edge, and its remnants immediately sold by the owner for a trifling sum. Accordingly, the efforts of the counsel for the damage claimants were directed mainly to establish the proposition that the act did not apply at all.

If this case, properly understood, involves any of the questions which we raise now, it is so by implication only. None of those questions was raised by counsel for the Hill Manufacturing Company or argued in his brief; and none of them (so far as the opinion shows) was considered by this Court. It is respectfully submitted that the questions are too grave to be allowed to be settled *sub silentio.*

FIFTH POINT.

The views now contended for would not, if adopted, vitiate the remedies which Revised Statutes, Sections 4284–5, intended to give to shipowners.

We do not feel bound to maintain this proposition.

For, in our judgment, those sections ought to be considered inoperative, and the whole matter left to Congress for further legislation *if the rights of shipowners thereunder cannot be worked out except by such a sacrifice of the equally clear rights of damage sufferers under the same sections as appears in this record.* We say "*sacrifice.*" Are we not justified in saying so by the opinion of Judge BROWN who believes that "to deprive the creditor finally of due hearing and of a proper defense of his interests in the appraisement and in fixing the amount of the substituted stipulation, which is to limit the possible amount of recovery, would be * * * to deny him a hearing of the most vital part of the case, and a violation of the principles of common right," but at the same time feels bound to hold that the *ex parte* appraisement is *prima facie* binding so as to compel creditors to go to Boston and assume there the grievous burden of showing satisfactorily "that the previous appraisement was mistaken and inadequate, and that the duty of the appraisers had been inadequately performed"—in other words, of proving "fraud or mistake" within the meaning of those terms as used by Mr. Justice NELSON in the case of *The Union* cited by Judge BROWN?

Nevertheless, we believe that our proposition is true, and that it is not necessary to uphold the proceedings of the Metropolitan Steamship Company in this case in order to preserve, for shipowners generally, practically efficient remedies under the specified sections of the act.

A. The shipowner may, if he chooses, transfer his interest in vessel and freight to a trustee appointed by any District Court under Section 4285, and, after a hearing of all persons of whom personal jurisdiction can be obtained, he may have an injunction operative upon those persons. There is

no reason, so far as we can see, why he may not also maintain an ancillary suit in any other district, and after a hearing procure an injunction that shall be operative throughout that district. He cannot have any injunction without a hearing (other than a temporary restraining order to be in force only till a hearing can be had), and he cannot obtain in any one district an injunction that shall be operative throughout the United States—from Maine to Alaska—upon persons of whom personal jurisdiction has not been obtained.

B. He may, if he chooses, maintain an apportionment suit under Sec. 4284, making a proper offer in his libel and proceeding against his own vessel as well as against damage claimants, as by the report appears to have been done in *In re Garnett*, 141 U. S., 1. This would authorize proceedings according to the mode of procedure prescribed for *in rem* cases, and would force damage claimants to appear lest they should be estopped of record on the question whether the vessel was in fault or not. The damage claimants having appeared, and being in court, the suit could then go on to the establishment and apportionment of the fund.

This course could also be taken if the vessel had been libeled in an ordinary damage case and discharged on stipulation for value or sold and the proceeds paid into court. The stipulation or the proceeds, like the vessel itself, would be, as it seems to us, a proper basis for proceeding *in rem* at the beginning of the apportionment suit; and this we suppose to be what is meant by the *dicta* of this Court in Norwich Co. vs. Wright, 13 Wall., 104, and in The Benefactor, 103 U. S., at page 246, when compared with the decision in the City of Norwich, 118 U. S., 468.

C. Or, without libelling his vessel (making proper

submission himself), he may sue *in personam* under Sec. 4284 in any district where personal jurisdiction of damage claimants can be obtained. In our case, for example, if the Metropolitan Steamship Company did not wish to transfer to a trustee and did not wish to libel the "Dimock," why did it not go to some district where Vanderbilt could be served with process? Vanderbilt is evidently the only person of whom the steamship company is at all apprehensive. He is the only person alleged, in the libel filed in Massachusetts, to have suffered any loss whatever by the collision.

In one or other of these three ways, it seems to us that a practically efficient remedy suited to any set of facts can be worked out. If the alleged guilty ship has been destroyed, then course A could be followed. If the ship is not destroyed, and there are many sufferers of large losses, then course B may be taken. If (as in our case) one man has suffered a great loss, and others little or nothing, then course C would answer.

SIXTH POINT.

The suit for apportionment on the libel of Morrison, under the Limited Liability Act, in the Southern District of New York, in which suit jurisdiction both in rem and in personam has been obtained, should be reinstated.

ELIHU ROOT,
HARRINGTON PUTNAM,
SAMUEL B. CLARKE,
Of Counsel.

APPENDIX.

I.

The Limited Liability Act.

R. S. SEC. 4282. "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

SEC. 4283. "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

SEC. 4284. "Whenever any such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and (*owner*) (owners) of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any

court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

SEC. 4285. "It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

SEC. 4286. "The charterer of any vessel, in case he shall man, victuals and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

SEC. 4287. "Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen for or on account of any embezzlemant, injury, loss, or destruction of merchandise, or property put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

SEC. 4288. "Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gun-powder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation."

SEC. 4289. " The provisions of (*this Title*) (the seven proceeding sections) relating to the limitation of the liability of the owners of vessels, shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

ACT JUNE 26, 1884, SEC. 18 (23 Stats., 53): "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of a vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship owners."

ACT JUNE 19, 1886, SEC. 4 (24 Stats., 79): That Section forty-two hundred and eighty-nine of the Revised Statutes be amended so as to read as follows:

" 'SEC. 4289. The provisions of the seven preceding sections, and of Section eighteen of an act entitled " An act to remove certain burdens of the American mer-

chant marine and encourage the American foreign carrying trade and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.' "

II.

The commission of the Supreme Court and of the Circuit and District Courts to make rules of procedure for equity and admiralty causes.

R. S., SEC. 862. " The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

SEC. 913. " The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

SEC. 917. " The Supreme Court shall have power to

prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the Court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts."

SEC. 918. "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

III.

The Rules prescribed by the Supreme Court for Limited Liability Proceedings.

Original heading of rules (13 Wall., XII.) "SUPPLEMENTARY RULES OF PRACTICE in ADMIRALTY, under the Act of March 3d, 1851 entitled 'An Act to limit the liability of ship owners, and for other purposes.'"

RULE 54 (as amended 137 U. S., 711): "It is ordered

by the court that Rule 54 of the Rules of Practice in Admiralty be amended so as to read as follows: 54. When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "an act to limit the liability of ship owners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and, thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into Court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the Court under the fourth section of said act; and upon compliance with such order, the said Court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing

them to appear before the said Court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same: and public notice of such monition shall be given as in other cases, and such further notice re-served, through the Post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

It is further ordered that the present heading to this rule be erased."

RULE 55 (13 Wall., XIII.): "Proof of all claims which shall be presented in pursuance of said monition, shall be made before a commissioner to be designated by the court, subject to the right of any person interested, to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claim so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expenses), shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled."

RULE 56 (*Idem*): "In the proceedings aforesaid the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided that in his or their libel or petition, he or they shall state the facts and

circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both."

RULE 57 (as amended, 130 U. S., 705): "The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be liable to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libelled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libelled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ships have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules."

RULE 58 (103 U. S. XIII): "All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts upon appeal from the district courts."

IV.

Rule 59 Regulating Collision causes in rem and in personam (112 U. S. 713):

"In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against, *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 8, ORIGINAL.

EX PARTE: IN THE MATTER OF HENRY MORRISON, PETITIONER.

RETURN OF THE HONORABLE ADDISON BROWN, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, TO THE RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT BE GRANTED.

FILED OCTOBER 29, 1892.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

NO. 8, ORIGINAL.

EX PARTE: IN THE MATTER OF HENRY MORRISON, PETITIONER.

Supreme Court of the United States—October term, 1892.

Ex parte: In the matter of Henry Morrison, petitioner.

To the honorable the Justices of the Supreme Court of the United States:

In obedience to the order in the above matter, dated October 24, 1892, directing the district court of the United States for the southern district of New York, and the undersigned as the judge thereof, to show cause on the second Monday of November, 1892, why a writ of mandamus should not be granted as prayed in the petition in the above matter.

The undersigned respectfully states that the libel of the petitioner against the steamship H. F. Dimock, et al., referred to in the petition, was, upon motion of the claimants of the Dimock, after hearing of the respective parties, upon the papers annexed to the said petition, dismissed, and the process issued upon said libel set aside, by order of this court dated and filed October 7, 1892, upon the grounds stated in the opinion dated and filed on the same day, and referred to in said order of dismissal as a part thereof, as appears set forth at large in the papers annexed to the petition; and the undersigned thereupon submits the matter in question to the determination of the Supreme Court.

Dated Oct. 28, 1892.

(Signed) ADDISON BROWN,
U. S. District Judge, So. Dist. of New York.

(Endorsed:) Supreme Court, U.S., October Term, 1892. No. 8, original. Ex parte: In the matter of Henry Morrison, petitioner. Return of Addison Brown, U. S. district judge, to rule. Filed Oct. 29, 1892.